

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal and Civil Justice Appropriations Committee

BILL: CS/SB 1824

INTRODUCER: Commerce Committee; Senators Gelber, Oelrich, and others

SUBJECT: Misrepresentation of Military Status

DATE: April 14, 2010

REVISED: _____

| ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----------------|----------------|-----------|------------------|
| 1. O'Callaghan | Cooper | CM | Fav/CS |
| 2. Cellon | Cannon | CJ | Favorable |
| 3. Butler | Sadberry | JA | Favorable |
| 4. _____ | _____ | _____ | _____ |
| 5. _____ | _____ | _____ | _____ |
| 6. _____ | _____ | _____ | _____ |

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|--|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="checked" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

The bill makes it unlawful for a person to solicit funds by falsely stating or representing that he or she is a member or representative of the United States Armed Forces or the National Guard. It is already unlawful to do the same under the guise of being a member of law enforcement or an emergency service organization.

In addition, the bill prohibits a person from wearing the uniform of, or any medal or insignia authorized for use by members or veterans of, the United States Armed Forces or the National Guard, and misrepresenting himself or herself as a member or veteran of the United States Armed Forces or the National Guard while soliciting for charitable contributions.

Any person who commits a prohibited act in the bill commits a felony of the third degree except that a second or subsequent offense punishable under s. 496.417, F.S., is a second degree felony.

The bill amends section 496.415, Florida Statutes. The bill creates section 817.312, Florida Statutes.

II. Present Situation:

United States Armed Forces

Article I, s. 8 of the United States (U.S.) Constitution, grants Congress the power to:

- Raise and support Armies, provide and maintain a Navy, and call forth a Militia to execute the Laws of the Union and suppress insurrections and repel invasions.
- Provide for organizing, arming, and disciplining, the Militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the Officers.
- Train the Militia according to the discipline prescribed by Congress.

Article II, s. 2 of the U.S. Constitution, provides that the President shall be the “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”

The five military branches that exist within the United States Armed Forces are the Army, Marine Corps, Navy, Air Force, and the Coast Guard.¹ These branches often work together, especially in times of war, to facilitate troop movements, equipment, food, armaments, and medical supplies.²

Army

The Army is the oldest military branch, established in the U.S. during the Continental Congress on June 14, 1775.³ The Army is also the largest U.S. military branch.⁴ The Army consists of approximately 675,000 soldiers; approximately 488,000 are on active duty and 189,000 are in the Army Reserve.⁵ The primary duty of the Army is to protect and defend not only the U.S., but also its interests around the world through the use of ground troops, artillery, and tactical weapons.⁶

Marine Corps

The Marine Corps was also established by the Continental Congress on November 10, 1775.⁷ The Marine Corps is one of the smallest branches of the U.S. military having approximately 200,000 marines.⁸ The primary function of the Marine Corps is to act as an assault force to control beachheads and prepare the way for landing forces of the U.S. Navy, as well as Army

¹ Soldier.net Land-based armed forces, *Five Branches of the Military*, available at <http://www.soldier.net/five-branches-of-the-military/>.

² *Id.*

³ *Id.* See also, GoArmy.com, *About the Army: Commissioned Officer*, available at <http://www.goarmy.com/about/officer.jsp>.

⁴ *Id.*

⁵ GoArmy.com, *About the Army: Personnel*, available at <http://www.goarmy.com/about/personnel.jsp>.

⁶ *Supra* fn. 1.

⁷ *Id.* See also, Marines: The Few. The Proud., *1775: Founding of the Marine Corps*, available at http://www.marines.com/main/index/winning_battles/history/missions/founding_of_the_marine_co.

⁸ Navy.org, *Which Military Branch: 5 Branches of the US Military – Which One Do You Like?*, available at http://www.navy.org/which_branch/.

personnel.⁹ Because the Marine Corps works closely with the Navy in times of war, they are able to rapidly deploy through the use of their own air power.¹⁰

Navy

Like the Army and the Marine Corps, the Continental Congress established the U.S. Navy in 1775.¹¹ The Navy has approximately 330,000 active duty personnel and 104,000 reservists.¹² The Navy is primarily assigned the duty of maintaining and ensuring freedom on the open seas.¹³ Naval ships, including aircraft carriers and destroyers, couple their efforts with the Air Force to transport combat personnel over the open seas.¹⁴

Air Force

The Air Force is the youngest branch of the U.S. Armed Forces. The National Security Act of 1947 was passed on July 26, 1947, and became effective on September 18, 1947.¹⁵ The act created the Department of the Air Force, headed by a Secretary of the Air Force.¹⁶ Prior to 1947, it was known as the Army Air Forces and was designed to support Army ground forces.¹⁷ Following World War II, the Air Force was created to defend the United States in the air as well as in outer space.¹⁸ There are approximately 330,000 individuals on active duty in the Air Force.¹⁹

Coast Guard

The Coast Guard is created in Title 14 of the U.S. Code, which states: “The Coast Guard as established January 28, 1915, shall be a military service and a branch of the Armed Forces of the United States at all times.”²⁰ The Coast Guard has approximately 42,000 individuals serving on active duty.²¹ Upon the declaration of war or when the President directs, the Coast Guard operates under the authority of the Department of the Navy.²² Otherwise, the Coast Guard is to provide law enforcement support as well as rescue services in peacetime.²³

⁹ *Supra* fn. 1.

¹⁰ *Id.*

¹¹ *Id.* See also, Naval History & Heritage Command, *Navy Birthday Information – 13 October 1775*, available at <http://www.history.navy.mil/birthday.htm>.

¹² Navy.mil, Official Website of the UNITED STATES NAVY, *Status of the Navy*, available at http://www.navy.mil/navydata/navy_legacy_hr.asp?id=146.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ The official web site of the U.S. Air Force, *Air Force History Overview*, available at <http://www.af.mil/information/heritage/overview.asp>. See also, The official web site of the U.S. Air Force, *The U.S. Air Force*, available at <http://www.af.mil/information/factsheets/factsheet.asp?id=2>.

¹⁶ *Id.*

¹⁷ *Id.* See also, *supra* fn. 1.

¹⁸ *Supra*, fn. 1. See also, Air Force Space Command, *Heritage 1940s-1950s*, available at <http://www.afspc.af.mil/heritage/1940s-1950s.asp>.

¹⁹ Air Force Personnel Center, *Air Force Demographics*, available at <http://www.afpc.randolph.af.mil/library/airforcepersonnelstatistics.asp>.

²⁰ United States Coast Guard U.S. Department of Homeland Security, *About Us*, available at <http://www.uscg.mil/top/about/>.

²¹ *Id.*

²² *Id.*

²³ *Supra* fn. 1.

The Florida National Guard

The Florida National Guard (FNG) is the state's modern "organized" militia. The FNG is composed of

...members of the militia enlisted therein and of commissioned officers and warrant officers who are citizens of the United States, organized, armed, equipped, and federally recognized, in accordance with the laws of the state and the laws and regulations of the Department of the Army and the Department of the Air Force.²⁴

The FNG is an essential reserve component of the national defense force.²⁵ Its organization, arms, and training correspond to that of the federal military. The National Guard Bureau of the Department of Defense (DOD) determines the number of units and positions for the FNG, consistent with the force structure requirements of the DOD's overall national military strategy.

The FNG is also the governor's primary military force to "preserve the public peace, execute the laws of the state, suppress insurrection, or repel invasion."²⁶ Over its history, the Governor has mobilized the FNG primarily in response to natural disasters.

Military Charitable Organizations

The conflicts in Afghanistan and Iraq have brought renewed attention to the men and women serving in the Armed Forces and to their families.²⁷ Many Americans, wishing to show their support for those serving or who have served in the military, are donating to charities.²⁸

There are many charitable organizations that provide assistance to members or veterans of the military or to those member's or veteran's families. However, it has been reported that not all charitable organizations effectively provide assistance to military members or veterans or their families. An investigative report conducted by Matthew Kauffman of the *Hartford Courant* found that:

... 'veterans' groups are more than twice as likely as other charities to use professional solicitors, which typically keep 70 to 90 cents of every dollar they raise. As a result, 'veterans' charities overall spend a vastly greater percentage of their budgets on fundraising, leaving less money available to help ex-GIs struggling with health care, housing or financial problems.²⁹

Federal Regulation

On December 20, 2006, the "Stolen Valor Act of 2005" was signed into law. The act includes the following Congressional findings.

²⁴ Section 250.07, F.S.

²⁵ 10 U.S.C.A., 261.

²⁶ Article IV, s. 1, Fla. Const.

²⁷ Heck, Andrew; Charity Navigator; *Supporting America's Heroes- How to Select a Police, Firefighters or Veterans Charity*; available at <http://www.charitynavigator.org/index.cfm?bay=content.view&cpid=280>.

²⁸ *Id.*

²⁹ *Id.* Investigatory report by Matthew Kauffman, staff writer at the Hartford Courant, available at <http://www.charitynavigator.org/index.cfm/bay/content.view/catid/64/cpid/351.htm>.

- Fraudulent claims surrounding the receipt of the Medal of Honor, the distinguished-service cross, the Navy Cross, the Air Force Cross, the Purple Heart, and other decorations and medals awarded by the President or the Armed Forces of the United States damage the reputation and meaning of such decorations and medals.
- Federal law enforcement officers have limited ability to prosecute fraudulent claims of receipt of military decorations and medals.
- Legislative action is necessary to permit law enforcement officers to protect the reputation and meaning of military decorations and medals.³⁰

Section 704, 18 U.S.C., provides that whoever knowingly wears or purchases any decoration or medal authorized by Congress for the U.S. Armed Forces, or any of the service medals or badges awarded to the members of such forces, including imitations, except when authorized under regulations made pursuant to law, shall be fined or imprisoned up to six months, or both.

In addition, whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for U.S. Armed Forces, any of the service medals or badges awarded to the members of such forces, or imitation of such item, shall be fined or imprisoned up to 6 months, or both. If a person makes such representations with a Congressional Medal of Honor, or an imitation, an offender may be fined or imprisoned up to 1 year, or both. Enhanced penalties are also provided for misrepresentation using a distinguished-service cross, a Navy Cross, an Air Force Cross, a silver star, a Purple Heart, or any replacement or duplicate medal for such medals as authorized by law.

State Regulation of Military Charitable Organizations

According to the National Conference of State Legislatures, at least 13 states have proposed legislation or passed legislation to prohibit the impersonation of a member or veteran of the military and provide a penalty for such impersonation.³¹

In Florida, it is unlawful for any person in connection with the planning, conduct, or execution of any solicitation or charitable or sponsor sales promotion to falsely state that the person is a member of, or a representative of, a charitable organization or sponsor, or falsely state or represent that the person is a member of or represents a law enforcement or emergency service organization.³² Any person who commits such an act commits an unfair or deceptive act or practice or unfair method of competition in violation of ch. 501, part II, F.S., and is subject to the penalties there under.³³ In addition, a person who commits such a misrepresentation commits a felony of the third degree, or for a second or subsequent conviction, a felony of the second degree.³⁴

³⁰ 18 U.S.C. 704.

³¹ National Conference of State Legislatures; *2003-2009 Legislation Regarding Impersonating the Military or Veterans or Unauthorized Use or Display of Uniforms or Medals*; October 14, 2009; on file with the Commerce Committee. Note: The 13 states include NY, CA, KY, OK, CT, NJ, PA, UT, OR, IL, GA, ID, and WA.

³² Section 496.415(6), F.S.

³³ Section 496.416, F.S. *See also*, s. 501.2075, F.S., providing that a person in violation of the Florida Deceptive and Unfair Trade Practices Act, is liable for a civil penalty of up to \$10,000 for each violation.

³⁴ Section 496.417, F.S.

Section 250.43, F.S., make it unlawful for any person, other than a person authorized by law, to wear a uniform or insignia of rank worn by officers of the National Guard or wear the uniform of the United States Army, Navy, Marine Corps, Air Force, National Guard, Naval Militia, or Marine Corps or any part of such uniform, or imitation uniform. Such an offense is a misdemeanor of the first degree. However, the Fifth District Court of Appeals recently held in *State v. Montas*, 993 So.2d 1127 (Fla. 5th DCA 2008), that s. 250.43, F.S., was unconstitutional because of its overbreadth, which implicated 1st Amendment freedom of expression rights.

Current law also provides that it is a misdemeanor to wear a badge or insignia of certain organizations or societies if the person does so to obtain aid or assistance within this state or if the person is not authorized by law to wear the badge.³⁵

III. Effect of Proposed Changes:

Section 1 amends s. 496.415(6), F.S., to prohibit a person, who is engaged in the planning, conduct, or execution of the solicitation of funds for charitable or sales promotions, from misrepresenting that he or she is a member or representative of the United States Armed Forces or the National Guard.

Any person who willfully and knowingly commits unlawful conduct under s. 496.415(6), F.S., is subject to the penalties provided for in ss. 496.416 and 496.417, F.S. Specifically, s. 496.416, F.S., provides for the application of a civil penalty of up to \$10,000 per violation under the Florida Deceptive and Unfair Trade Practices Act, part II, ch. 501, F.S. Section 496.417, F.S., provides that the criminal penalty for such conduct is a felony of the third degree and for a second conviction, a felony of the second degree.

Section 2 creates s. 817.312, F.S., to prohibit a person from wearing the uniform of, or any medal or insignia authorized for use by members or veterans of, the United States Armed Forces or the National Guard and to misrepresent himself or herself as a member or veteran of the United States Armed Forces or the National Guard while soliciting for charitable contributions.

Any person, who commits an act prohibited in this section, commits a felony of the third degree.

Section 3 provides an effective date of October 1, 2010.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

³⁵ See s. 817.30, F.S., pertaining to badges of the Grand Army of the Republic, the Military Order of the Loyal Legion of the U.S., the Military Order of Foreign Wars of the U.S., the Patrons of Husbandry, the Benevolent and Protective Order of Elks of the U.S.A., the Woodmen of the World, or of any society, order or organization of 5 years' standing in the state; s. 817.31, F.S., pertaining to a badge of the American Legion; and s. 817.311, F.S., pertaining to any badge or use of any name or claim to be a member of any benevolent, fraternal, social, humane, or charitable organization, which organization is entitled to the exclusive use of such name and such badge, button, insignia or emblem.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

First Amendment Freedom of Expression³⁶

Although the First Amendment of the U.S. Constitution protects speech, some conduct may be deemed a form of communication that falls within the ambit of the First Amendment speech. To determine whether conduct is speech protected by the First Amendment, one must look at the conduct that actually occurred and the context in which it occurred.

Conduct is expressive when the actor intends to communicate a particular message by his or her actions and that message will be understood by those who observe it because of the surrounding circumstances. The First Amendment perception and intent analysis to determine whether certain “speech” is constitutionally protected is not necessary when printed or spoken words, as opposed to symbolic expressions, are used. In determining whether conduct was “expressive conduct,” a court must ask whether a reasonable person would interpret it as some sort of message, not whether an observer would necessarily infer a specific message. Conduct that is ordinarily expressive may not be intended to express any message in some circumstances and therefore, would not be entitled to First Amendment protection.

The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word, but it may not prohibit particular conduct because it has expressive elements. A law directed at the communicative nature of conduct must, like laws directed at speech itself, be justified by a substantial showing of need for that restriction, as required by the First Amendment.

Symbolic expression may be forbidden or regulated only if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech. A governmental regulation is sufficiently justified, despite its incidental impact upon expressive conduct protected by the First Amendment, if it is within the constitutional power of the government; it furthers an important or substantial governmental interest; the governmental interest is unrelated to the suppression of free speech; and the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

³⁶ This section of the analysis, concerning First Amendment implications, is synthesized from information provided in 16A Am. Jur. 2d Constitutional Law § 528.

The court held in the case of *State v. Montas*, 993 So.2d 1127 (Fla. 5th DCA 2008), that s. 250.43, F.S., which prohibits a person who is not a member of the National Guard or U.S. Armed Forces from wearing the uniform or insignia of the National Guard or U.S. Armed Forces, was unconstitutionally overbroad and a violation of due process, because the law could implicate lawful behavior, including a person's free speech rights under the 1st Amendment of the U.S. Constitution. In *Montas*, Mr. Montas, who was arrested for violating s. 250.43, F.S., alleged that he was wearing the military uniform as an act of patriotism and to support members of his family in the military. The State alleged that Mr. Montas was wearing the uniform to circumvent security. The court noted that even if Mr. Montas' actions were not innocent, "where the asserted overbreadth of a law may have a chilling effect on the exercise of first amendment freedoms, a challenge will be permitted even by one who does not show that his own conduct is innocent and not subject to a narrowly drawn statute."³⁷

The bill, should it become law, could be challenged under the 1st Amendment of the U.S. Constitution, or under article 1, section 4 of the Florida Constitution, as violation of free speech rights.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Should this bill become law, some charitable organizations may see a decrease in profits if their employees or volunteers are no longer able to misrepresent that they are members of the military or are no longer able to impersonate a military person by wearing military uniforms or insignia to solicit donations if that has been the organization's practice in the past.

C. Government Sector Impact:

Because the bill creates a new felony, the Criminal Justice Impact Conference reviewed its companion bill (House Bill 1455) for fiscal impact. On March 17, 2010, the conference determined the impact on prison population to be insignificant.³⁸ The House and Senate bills are identical except for minor drafting differences.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

³⁷ *Matos*, 993 So. 2d at 1130, FN2, citing *Bigelow v. Virginia*, 421 U.S. 809 (1975).

³⁸ Criminal Justice Impact Conference, March 17, 2010. <http://edr.state.fl.us/conferences/criminaljustice/Impact/cjimpact.htm>

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Commerce on March 10, 2010:

- Replaces the term “organized militia” with “National Guard” in sections 1 and 2, to clarify the restriction;
- Narrows the restriction from “commercial purposes” to “soliciting for charitable contributions”; and
- Deletes section 3, which provided an exemption from the penalties proposed by the bill.

- B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.
